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Chairman Ajit Pai
Commissioner Mignon Clyburn
Commissioner Michael O'Rielly
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Petition for Reconsideration of Action in Rulemaking Proceeding - CG Docket No. 02–278*

Dear Chairman Pai and Commissioners Clyburn and O'Rielly:

On behalf of America's credit unions, I am writing regarding the Federal Communication Commission's (FCC) implementation of the Bipartisan Budget Act of 2015 (Budget Act) and the subsequent Petition for Reconsideration of the August 2016 Report and Order from Great Lakes Higher Education Corp., Navient Corp., Nelnet Inc., Pennsylvania Higher Education Assistance Agency, and the Student Loan Servicing Alliance. The Credit Union National Association (CUNA) represents America's credit unions and their more than 100 million members.

When implementing the Budget Act, the FCC failed to address the concerns Congress had with the unreasonable limitations the Telephone Consumer Protection Act (TCPA) places on the ability to contact consumers with information that they want and need. Congress recognized the arbitrary requirements the FCC's July 2015 TCPA Omnibus Declaratory Ruling and Order (Order) placed on the ability to communicate with consumers, and sought to rectify this for collecting debts owed to or guaranteed by the federal government.[1] Unfortunately, the rules adopted by the FCC are contrary to Congress's intent and are unsupported by the plain language of the statute and the record in this proceeding. The fatal flaws in the FCC's rule implementing the Budget Act mirror the fatal flaws of the July 2015 TCPA Order on a broader scale as it applies to all businesses and financial institutions communicating with consumers on their cell phones. Accordingly, we urge the FCC to consider how it can streamline and simplify the onerous guidance currently in place under the TCPA, so that consumers can receive the information they want and need.

I. Background

The TCPA and the FCC's rules generally require a caller to obtain the prior express consent of the called party when: (1) making a non-emergency telemarketing call using an artificial or prerecorded voice to residential telephone lines; and (2) making any non-emergency call using

[1] *In re Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Declaratory Ruling and Order, CG Docket No. 02-278, WC Docket No. 07-135, FCC 15-72 (July 10, 2015).

an automatic telephone dialing system (autodialer) or an artificial or prerecorded voice to a wireless telephone number, among other specified recipients. However, the Budget Act amended the law so that calls, "made solely pursuant to the collection of a debt owed to or guaranteed by the United States," are exempt from the requirement to obtain prior express consent.[2]

Regrettably, the FCC's interpretation of this law in its rule has many of the same problems of its July 2015 TCPA Order, which shows a fundamental lack of understanding of the need to communicate with consumers in a timely and efficient manner. The limit on the number of calls in its rule frustrates the intent of Congress in passing the changes in the Budget Act. Specifically, limiting the exemption to include only three calls per month does little to improve communications with consumers, as does unnecessarily impeding the ability to call reassigned numbers. Accordingly, we urge the FCC to reconsider the following in its rule:

- Allow the exemption to cover more than three calls per month;
- Allow the exemption to cover calls that reach a reassigned number beyond a one-call safe harbor; and
- Clarify that federally guaranteed mortgage debt and small business administration loans are included in the exemption.

As an overarching matter, we also urge the FCC to reevaluate its larger interpretation of the TCPA, which imposes significant impediments on the ability of financial institutions, such as credit unions, to communicate with their members. The FCC should reconsider the July 2015 TCPA Order in its entirety and reevaluate whether a more appropriate interpretation of the TCPA could protect consumers from unwanted telemarketing calls, while still allowing consumers to receive timely communications from their credit union and other community financial institutions. This analysis should also consider the statements and guidance of financial regulators, such as the Consumer Financial Protection Bureau (CFPB), that consistently urge financial institutions to maintain adequate communication with consumers.

II. The FCC's Interpretation of the Budget Act is Not in Line with the Law Passed by Congress

In its rule published in August, the FCC restricts the exemption to existing debts for which the United States is currently the owner or guarantor, but did not clarify which federal debts are included or excluded from coverage. Debt collection calls/texts fall under the exemption for federal debts if the consumer is delinquent at the time the call is made, if the consumer is at an imminent risk of delinquency as a result of the terms or operation of the loan program itself (e.g., end of grace or deferment period), and the communication is within the 30 days before the event. It also places a number of restrictions on making the exempt calls. It limits this number to three federal debt collection calls in a 30-day period. In addition, pre-recorded or artificial voice calls cannot exceed 60 seconds and text messages cannot exceed 160 characters. Furthermore, there is only a one-call safe harbor to reassigned numbers.

[2] Bipartisan Budget Act of 2015, Pub. L. No. 114-74, 129 Stat. 584 (Budget Act).

The three-call limit per month, which essentially includes any attempt to contact a consumer against this number, is very clearly unreasonable on its face since there are countless reasons one may not be able to connect with a consumer on the first few attempts. It will unquestionably limit the ability to help consumers facilitate repayment of debt, which could cause a host of other problems for them. The one-call limitation for calls to reassigned numbers, much like the limitations on calls from financial institutions discussed below, is also completely unreasonable and serves little purpose in protecting consumers. As Commissioner Michael O'Rielly outlined in his dissent, there are many reasons one may not connect with a consumer on the first call, but the benefit of eventually making contact with the consumer outweighs the harm of potentially receiving more than one call. He described these reasons stating, "Congress determined that the well documented benefits of making these calls outweighed any theoretical privacy concerns."[3]

When consumers learn about a debt, these communications are often the first step to resolving the issue and ensuring no harm is done to their credit, or no additional fees are assessed. The FCC has produced no compelling reason why it is appropriate to make it so overly difficult for callers to inform consumers about this much-needed information.

III. Mortgage Debt and Small Business Administration Loans Should be Included in the Exemption

In the rule, the FCC does not define what is included in debt "owed to or guaranteed by the United States." However, the federal government bears the risk of credit loss on some loans provided by credit unions, and we urge the FCC to specify that all such debts are included under this exemption. In its proposal, the FCC sought comment on whether there are specific types of debts that are covered by the phrase "debt owed to or guaranteed by the United States," such as federal student loans, Small Business Administration loans, and federally guaranteed mortgages. However, it did not fully address these questions in its rule.

Credit union mortgages backed by government-sponsored entities should qualify for the TCPA's exemption because the United States is at risk of credit loss despite not holding legal title to these mortgages. Enhanced and timely communications to borrowers about mortgage debt can also prevent foreclosures and other negative consequences for consumers, such as late fees. Other federal agencies, as well as state governments, have created specific policies to decrease the likelihood of foreclosures, and the FCC should not be adopting policies that conflict with these efforts. For example, the CFPB has put numerous policies in place to attempt to help distressed mortgage borrowers.[4] To the extent the FCC can provide relief to financial institutions subject to the TCPA in contacting distressed mortgage borrowers, it should.

Similarly, loans offered by credit unions through programs such as the SBA's 7(a) Loan Program, with up to 90% of the loan guaranteed by the SBA, should be included in the exemption. The SBA describes 7(a) loans as follows: "The 7(a) Loan Program is SBA's primary program for helping start-up and existing small businesses, with financing guaranteed for a

[3] *In the Matter of Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, Report and Order, CG Docket No. 02-278 (Aug. 11, 2016).
[4] Consumer Financial Protection Bureau, Foreclosure Avoidance, *available at* http://files.consumerfinance.gov/f/201312_cfpb_foreclosure-avoidance-procedures.pdf (2013).

variety of general business purposes. SBA does not make loans itself, but rather guarantees loans made by participating lending institutions. In this way, taxpayer funds are only used in the event of borrower default. This reduces the risk to the lender but not to the borrower, who remains obligated for the full debt, even in the event of default." In its own description, the SBA acknowledges that a borrower default will prompt the use of taxpayer funds. Accordingly, it is clear that these loans should be included in the FCC's definition of debt owed to or guaranteed by the federal government.

IV. Credit Unions Still Need Relief from the Onerous July 2015 TCPA Order

The July 2015 TCPA Order continues to limit credit unions' ability to communicate with members about important information such as fraud, data breaches, and other account updates. As soon as it was released, credit unions were sent into a state of disarray about how they could instantaneously comply with a document that is well over 100 pages filled with technical language and unclear nuances. While the July 2015 TCPA Order purported to recognize the importance of communications between financial institutions and consumers, and provided certain exemptions, as noted, the ruling in practicality creates obstacles to credit unions' ability to communicate with their members. The impossibility of complying with the July 2015 TCPA Order has caused many credit unions, particularly smaller ones, to cease using any calling device that could potentially be considered an autodialer altogether and in some instances to stop sending the text message updates that members previously relied on.

Surely when passing the TCPA decades ago, Congress did not intend to arbitrarily scrutinize and limit communications between credit unions, which are not-for-profit, member-owned financial cooperatives, and their members. The July 2015 TCPA Order has not only restricted important communications, but has attracted the attention of law firms seeking to profit from frivolous class action litigation and the exorbitant attorneys' fees and statutory damages associated with TCPA lawsuits. Frivolous class action litigation has proven costly and detrimental to the mission of credit unions to serve their members and provide the best products and service offerings at competitive rates.

A. The Exemption for Financial Institutions Provides Minimal Relief

In the July 2015 TCPA Order, the importance of receiving information from financial institutions was recognized. An exemption was provided for calls concerning: (1) transactions and events that suggest a risk of fraud or identity theft; (2) possible breaches of the security of customers' personal information; (3) steps consumers can take to prevent or remedy harm caused by data security breaches; and (4) actions needed to arrange for receipt of pending money transfers.

However, the conditions that must be met for a call to qualify as exempt are difficult, if not impossible, for credit unions to meet. The July 2015 TCPA Order requires the exempted calls be free-to-end-user calls, or in other words, there can be no charge of any kind to the consumer. This requirement places an unreasonable burden on financial institutions to ensure that notifications do not count against a recipient's plan for minutes or texts. The technology and resources to be able to administer this are not readily available to the majority of credit unions, particularly smaller credit unions.

Other conditions to qualify for this exemption apply as well. For example, a credit union (1) must initiate no more than three messages (whether by voice call or text message) per "event" over a three-day period for an affected account; (2) must offer recipients within each message an easy means to opt out of future messages; and (3) must honor opt-out requests immediately. The technicalities associated with each of these requirements creates many unanswered questions. For example, it is unclear what constitutes an "event."

Additionally, the exemption only allows calls and text messages to be sent to wireless numbers provided by the customer of the financial institution. An example of a problem with this is that it could preclude another member of a family with a different number, but who is impacted by the account update, from being allowed to receive a call about it.

These are just a few examples of problems associated with the conditions to qualify for the exemption for financial institutions.

B. The Expansion of What is Considered an Autodialer is Problematic

Another concerning aspect of the July 2015 TCPA Order is the expansion of what is considered an autodialer. Clarification on this is important for credit unions because if they are making informational calls using an autodialer to a consumer's cellular phone, they need either oral or written prior express consent. Notably, dissenting FCC Chairman Ajit Pai expressed concern that the language about what are considered an autodialer used in the July 2015 TCPA Order is so expansive that it could cause a device like a smartphone or a tablet to now be considered an autodialer. Currently, credit unions and others are not able to interpret from the July 2015 TCPA Order whether the calling system they use subjects them to the TCPA. As a result, some credit unions have decided they cannot bear the compliance risk of contacting consumers on their cell phones, which has limited important communications. Since the TCPA was enacted more than two decades ago, it is nearly impossible that Congress intended for the TCPA to apply to such a broad scope of calling devices. We urge the FCC to provide much needed clarification in this area, and to more narrowly define what is considered an autodialer.

C. Other Issues that Could Stifle Communication with Credit Union Members

Additionally, the FCC creates ambiguity about how consumers can revoke their consent for all autodialed calls stating that it can be done at any time and in any reasonable manner. This onerous language is problematic since consent could be revoked in almost any manner, including through oral conversations with an employee at any level of a credit union. Since it is not clear what is a "reasonable" way of revoking consent, credit unions theoretically have to monitor and document all communications in every manner with every member and every employee. This could be particularly problematic for credit unions who are proud of the fact they have employees at all levels who know their members and have longstanding relationships with them.

Furthermore, similar to the new requirements for calls made under the Budget Act exemption, the July 2015 TCPA Order increases the possibility of being liable under the TCPA when calling a reassigned number that the credit union has previously been given consent to call. The July 2015 TCPA Order also says that callers can make only one call under a safe harbor before they are considered to have actual or constructive knowledge that the number was reassigned. The

one-call safe harbor does not account for the dozens of reasons it may not be possible to connect with the new holder of the number in one attempt. The July 2015 TCPA Order indicates it does not matter whether the phone call is answered, the caller is still considered to be on notice. For credit unions serving working families who may switch jobs, move, or simply can no longer afford one type of wireless carrier plan over another, it makes no sense to penalize either the credit union or a member seeking information, because of a different number.

D. CFPB Statements Have Conflicted with the FCC's July 2015 TCPA Order

Other federal regulators and consumer groups share CUNA's views about the benefits of communicating with consumers on their cell phones. According to Pew Research Center, around 64 percent of American adults own smartphones, up 29 percent in just four years. Among the Americans who have smartphones, 10 percent said they do not have broadband access at home and 15 said they have limited online options beyond their mobile devices.[5] Mobile technology is often the preferred method of communication for consumers, and for many younger and lower-income consumers it may be their only method to receive communications. This is also the same demographic of consumers that can benefit the most when credit unions are able to intervene early to provide financial education or counseling. The CFPB, in particular, appears to recognize this benefit of increased communication.

Checking Account Field Hearing

During a CFPB field hearing in February of 2016, Director Richard Cordray urged both banks and credit unions to contact consumers on their cellular phone. During the hearing, he stated,

> "Let me also take a moment to acknowledge another positive development, which is the decision some banks and credit unions have made to provide consumers with real-time information about the funds in their accounts available to be spent. They are doing this through various means, including online banking and text and e-mail alerts, which can reduce the risks that consumers inadvertently overspend their accounts."

Credit unions that have over $10 billion in assets are supervised and examined by the CFPB, which has rulemaking and enforcement authority over numerous consumer protection laws to which all credit unions are subject. When the CFPB is urging them to use automated telephone communications to contact consumers to protect their credit, while the FCC is creating policies subjecting them to liability for doing this, it creates extremely problematic, conflicting guidance about how credit unions should be communicating with their members. Unfortunately, it also creates the possibility that consumers may not be able to receive the important updates they need about their financial situation if the liability is too great of a risk for credit unions.

Importance of Mobile Financial Services

Under the Dodd-Frank Wall Street Reform and Consumer Protection Act, the CFPB has the charge of promoting financial education, researching developments in markets for consumer

[5] Ungarino, Rebecca, "For More Poor Americans, Smartphones are lifelines," *available at* http://www.cnbc.com/2015/04/01/for-more-poor-americans-smartphones-are-lifelines.html (Apr. 1, 2015).

financial services and products, and providing information, guidance, and technical assistance regarding the offering and provision of consumer financial products or services to traditionally underserved consumers and communities. In this regard, the CFPB has provided the public information about how it believes the financial services marketplace should be communicating with consumers on mobile devices. In one such recent publication, the CFPB noted, "Major development in the consumer financial services market over the past few years has been the increasing use and proliferation of mobile technology to access financial services and manage personal finances. For example, in 2013, 74,000 new customers a day began using mobile banking services. Using a mobile device to access accounts and pay bills can reduce cost and increase convenience for consumers. By enabling consumers to track spending and manage personal finances on their devices through mobile applications or text messages, mobile technology may help consumers achieve their financial goals. For economically vulnerable consumers, mobile financial services accompanied by appropriate consumer protections can enhance access to safer, more affordable products and services in ways that can improve their economic lives."[6] Again, this reasoning directly conflicts with FCC policies that are making it more difficult to communicate with distressed consumers.

CFPB Notice of Proposed Rulemaking on Arbitration

Additionally, the CFPB recently provided some acknowledgement about the problems TCPA class actions could cause for small financial institutions, such as credit unions, in its Notice of Proposed Rulemaking concerning Arbitration Agreements. The proposed rule highlights that Small Entity Representatives (SERs) on the Arbitration Small Business Regulatory Enforcement Fairness Act panel noted they could not absorb the costs of TCPA-related class action lawsuits or settlements since there is no limit on the amount of statutory damages. The CFPB stated, "While the Bureau recognizes the concern expressed by SERs, among others, that particular statutes may create the possibility of disproportionate damages and awards, the Bureau believes that Congress and the courts are the appropriate institutions to address such issues."[7] Small credit unions have expressed similar concerns with the fear that even one class action, based on some alleged technical violation, could put the livelihood of the credit union and its members in jeopardy.

V. The FCC Should Address the Concerns of Congress, Businesses, and Consumers

The Petition for Reconsideration is a good first step in fixing some of the many problems recent TCPA guidance has caused for consumers and those seeking to contact them. However, as outlined in our comments, we believe the FCC needs to take a more wholescale approach to rectifying the conflicting and overly complex requirements under the TCPA. When credit unions, whose primary mission it is to serve consumers, remain vulnerable to frivolous TCPA class action litigation for contacting their own member-owners with information they requested—there is clearly a larger problem that must be addressed.

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[6] Consumer Financial Protection Bureau, *Mobile Financial Services*, *available at* http://files.consumerfinance.gov/f/201511_cfpb_mobile-financial-services.pdf (Nov. 2015) (emphasis added).

[7] Consumer Financial Protection Bureau, Proposed Rule on Arbitration Agreements, Docket No. CFPB-2016-0020, *available at* http://files.consumerfinance.gov/f/documents/CFPB_Arbitration_Agreements_Notice_of_Proposed_Rulemaking.pdf (May 2016).

We urge the FCC to consider our concerns and to make common sense reforms to allow credit unions to engage in much needed communications with their members. Thank you for the opportunity to comment on this Petition for Reconsideration. If you have any questions concerning our letter, please feel free to contact me.

Sincerely,

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